

pen register, as outlined by the Supreme Court: “Neither the purport of any communication between the caller and the recipient of the call, *their identities*, nor whether the call was even completed is disclosed by pen registers.”<sup>75</sup>

(2) Party hold, party join, party drop messages (§§ 73 – 75): The FBI admits (§ 77) that party hold and party drop messages were not available with pen registers. This is a case where the FBI is trying to expand its surveillance capabilities beyond the status quo. Party hold, drop and join messages do not identify calls, they identify callers. Again, the FBI bases these punch list items (§ 75) not on the need to identify communications, as CALEA requires, but to identify parties: “Without these messages, law enforcement would not know who joins or leaves a conference call, whether the subject alternated between calls, or which parties heard or said parts of a conversation.” Moreover, the FBI invents a new concept: It argues that CALEA requires carriers to provide call-identifying information for each ‘leg’ of a call. The concept of “legs” of conversations does not appear anywhere in CALEA.

(3) Access to all network-generated in band and out-of-band signaling: This includes a ringing signal, indicating whether the subject’s telephone was alerted by tones, visual indicators or text messages, and a busy signal, including a busy tone, a trunk busy signal, and a stutter tone (§ 80). It also includes a call waiting tone, (§§ 58, 80). The fact that a subscriber has a call waiting does not indicate the origin, direction, destination or termination of a communication. If the subscriber takes the call, certainly the carrier is required to identify its origin. If it is reasonably available, the carrier would also provide the origin of the waiting call even if the subscriber doesn’t take it. That would be the equivalent of a call attempt. But

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<sup>75</sup> *United States v. New York Tel. Co.*, 434 U.S. 159, 167 (1977) (emphasis added).

indicating that there is a call waiting does not identify the origin, destination direction or termination of the call at all.

(4) Message waiting indicator: This network intelligence does not identify a call and is outside the scope of CALEA. The Committee report states, “The storage of a message in a voice mail or E-mail ‘box’ is not covered by the bill.”<sup>76</sup>

None of these provisions find support in the definition of pen register or trap and trace device. The purpose of the call-identifying requirement as explained to Congress was to preserve access to data that had been acquired by pen registers and trap and trace devices, i.e., to ensure that law enforcement could obtain the phone number of origin of incoming calls and the phone number of destination of outgoing calls, notwithstanding a target’s use of services such as speed dialing, voice dialing, or call forwarding. “Such information [dialing type information] is critical to law enforcement and, historically, has been acquired through the use of pen register or trap and trace devices pursuant to court order.”<sup>77</sup> These were the problems the FBI talked about and which CALEA’s call-identifying provision was intended to address.<sup>78</sup>

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<sup>76</sup> House Report at 23.

<sup>77</sup> Hearings at 33.

<sup>78</sup> According to the definitions of pen register and trap and trace device, this is what CALEA was intended to preserve:

the term ‘pen register’ means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached . . . ;

the term ‘trap and trace device’ means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication is transmitted . . . .

Both pen registers and trap and trace devices identify “numbers.” This alone eliminates many of the punch-list items.

## **CONCLUSION**

Before the Commission are questions regarding the extent to which the Interim Industry Standard complies with the requirements of CALEA to meet law enforcement surveillance needs, protect individual privacy, and guard innovation in the development of new telecommunications technologies. CDT believes that several key provisions of the standard must be deleted because they contravene the explicit dictates of the statute and, as a result, pose grave threats to the privacy rights of Americans. The provisions at issue are: a) requirements that carriers provide real time location information, b) treatment of private information in packet data networks that would allow for improper disclosure of information to law enforcement, and c) a number of ‘punch list’ items requested by the FBI that we believe are not required under the statute.

CALEA is but the latest chapter in a long and contentious history of Congressional attempts to balance cherished privacy rights with the desire to provide law enforcement limited, but effective, electronic surveillance capabilities. As the most comprehensive expression of the balance between privacy, law enforcement authority, and (new with CALEA) preservation of technological innovation, Congress chose to express this delicate balance with a series of specific legislative requirements to be followed by communications carriers and equipment manufacturers.

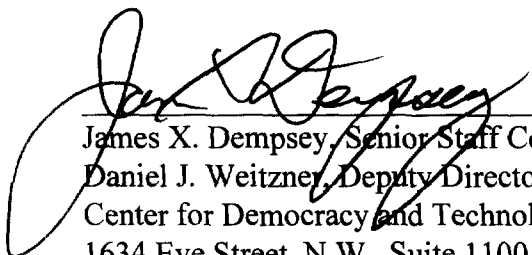
While the debate over the substance of the statute was long and contentious, Congress had hoped that the implementation process might be more constructive, inasmuch as the industry, in consultation with law enforcement, had only to implement the statutory requirements. However, in the event that the implementation process failed to produce an adequate standard,

Congress did provide procedures to resolve disputes and assure that the statutory mandates were realized.

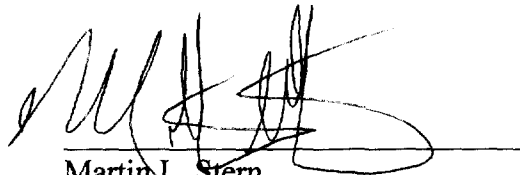
The four requirements at the heart of CALEA are both the “floor and the ceiling” on surveillance capabilities to be implemented under the statute. These requirements are the Congressional expression of the proper balance between law enforcement surveillance power and the privacy rights of all Americans. A standard which goes below this floor would jeopardize law enforcement interests, while one that exceeds this ceiling, would pose a threat to privacy and innovation. Regrettably, the FBI has sought to exceed the ceiling in several critical new areas of communications technology: requiring wireless networks to be turned into real-time tracking systems, and threatening the privacy rights of all who communicate using new packet data networks. We respectfully request that the Commission act to remove the portions of the standard that violate the privacy requirements of CALEA and provide appropriate guidance as to the meaning of the statutory requirements for all carriers and manufacturers who are subject to its dictate. Failure to do so would frustrate the delicate balance struck by Congress and threaten basic Constitutional rights of Americans in the Information Age.

Respectfully submitted,

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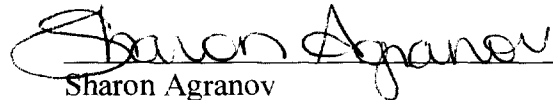
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I, Sharon Agranov, do hereby certify that copies of the Comments for the Center for Democracy and Technology have been served on the persons listed below via first class mail delivery on this 20th day of May, 1998.



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